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SUPREME COURT, U.S.

In The Supreme Court of the United States

CSX TRANSPORTATION, INC.
and RONALD PAUL BOWEN,

Petitioners,

v.

EARTHA MAE WILLIAMS,
as Personal Representative of the Estate
of Gregory Stanley Williams,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This case arises out of the collision of a truck driven by Gregory Williams and a ballast regulator, a piece of the Petitioner's railroad equipment, at Petitioner's railroad grade crossing on January 3, 2001, in Swansea, South Carolina. Mr. Williams was killed in the collision. On January 23, 2001, Respondent Eartha Mae Williams, Gregory Williams' mother, filed this wrongful death action against the Petitioner CSX Transportation, Inc. and Ronald Paul Bowen for the death of her son.

The Respondent alleged that Ronald Paul Bowen, the operator of the ballast regulator, was negligent and reckless in failing to yield the right-of-way, in failing to stop at the crossing, in failing to warn highway traffic of his approach, in proceeding over the crossing when the crossing was not clear, in failing to properly sound the horn, in operating the ballast regulator at an excessive rate of speed, in failing to keep a proper lookout, and in violating Petitioner's on-track operating rules. The Respondent alleged that Petitioner was vicariously liable for Mr. Bowen's actions. The Respondent further alleged Petitioner was liable for failing to maintain adequate warning devices at its crossing, failing to properly maintain the vegetation on its right-of-way to provide adequate sight distance for motorists using the crossing, and for allowing an unqualified and incompetent person to operate its ballast regulator. The Petitioner admitted that there was a collision and that Mr. Williams died as a result of the collision, but otherwise denied Respondent's allegations.

The trial of the case began on October 14, 2003, and concluded on October 30, 2003. Ronald Paul Bowen was dismissed as a defendant prior to the trial. The jury returned a verdict in favor of Respondent in the amount of 4.5 million dollars actual damages and 7.5 million dollars punitive damages.

The Petitioner filed post-trial motions seeking a judgment notwithstanding the verdict, new trial, and new trial *nisi* remittitur. The trial court held a post trial review of the punitive damages award pursuant to *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), *State Farm v. Campbell*, 538 U.S. 408 (2003), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The trial court entered an order reducing the punitive damages award by 3 million dollars. The trial court denied the other post-trial motions. (Petitioner's App., 13a-21a).

After the trial court ruled on the Petitioner's post trial motions, the Respondent filed a notice of appeal from the order reducing the punitive damages award. The Petitioner also filed a notice of appeal from the jury's verdict and the denial of its post-trial motions. The Supreme Court of South Carolina exercised jurisdiction over the appeal without a decision of the South Carolina Court of Appeals.

On appeal, the Petitioner alleged, among other things, that the trial court erred by not bifurcating the issues of liability and punitive damages for separate trials, by not using Petitioner's special verdict form, and by not charging the jury with the Petitioner's proposed jury charges on punitive damages. The Petitioner argued this error warranted "a new trial on punitive damages."

After hearing oral arguments, the Supreme Court of South Carolina issued an unpublished opinion on January 2, 2007. The Supreme Court of South Carolina affirmed the jury's award of actual damages and reversed the jury's award of punitive damages. The Supreme Court of South Carolina found the trial court erred in charging the jury on negligence *per se*, but that the erroneous charge did not constitute reversible error because the Petitioner failed to show that it was "injured and prejudiced" by the instruction as required under South Carolina law. (Petitioner's App., 7a) The Supreme Court of South Carolina found that the Petitioner had not been prejudiced by the negligence *per se* charge because there were a number of thoroughly developed theories of liability presented in the case. The Supreme Court of South Carolina reversed the jury's award of punitive damages because "the trial court's jury instructions... misstated the standard of proof for clear and convincing evidence" for an award of punitive damages as required under South Carolina Code Ann. § 15-33-135 (2005). (Petitioner's App., 9a). As the Petitioner requested, the Supreme Court of South Carolina remanded the case for a new trial on the issue of punitive damages.

The Petitioner filed a Motion for Rehearing and contended that a retrial on only punitive damages would violate Petitioner's due process rights, that the Supreme Court of South Carolina misapplied the "two issue rule," and that the court's decision allows the admission of evidence that "is constitutionally impermissible under [the Supreme Court of South Carolina's] decision in *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005)." The Petitioner's assertion in its Motion for Rehearing that a new trial limited to punitive damages would violate its rights of due process directly

contradicts its previous argument to the Supreme Court of South Carolina that "[i]f [Petitioner] is not entitled to judgment as a matter of law on punitive damages, the improperly admitted evidence ... [is] sufficiently prejudicial and unrelated to the cause of plaintiff's injuries to warrant a new trial on punitive damages." In seeking a new trial on punitive damages before the Supreme Court of South Carolina, the Petitioner cited *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004) and *Wohlwend v. Edwards*, 796 N.E.2d 781, 786-87 (Ind. Ct. App. 2003). (Appellant's Final Brief on Behalf of Appellant/Respondent, p. 42). The courts in each of these cases remanded for a retrial limited to the issue of punitive damages.

The Supreme Court of South Carolina did not apply the "two issue rule" in upholding the jury's award of actual damages. The "two issue rule" was only even mentioned in the single dissent to the court's opinion. Further, the Supreme Court of South Carolina's decision was not inconsistent with its holding in *Webb v. CSX Transp., Inc., supra*. The Supreme Court of South Carolina denied Petitioner's Motion for Rehearing without specifying the reasons for the denial. (Petitioner's App., 22a-23a).

REASONS FOR DENYING THE WRIT

I. THE PETITIONER INVITED THE ERROR OF WHICH IT NOW COMPLAINS.

The Petitioner argues that a retrial of only punitive damages will violate its constitutional rights even though the Petitioner requested that the Supreme Court of South Carolina grant a new trial on the issue of punitive

damages as one of the potential avenues of relief. The Petitioner, in seeking a new trial on punitive damages, stated:

> "If [Petitioner] is not entitled to judgment as a matter of law on punitive damages, the improperly admitted evidence ... [is] sufficiently prejudicial and unrelated to the cause of plaintiff's injuries to warrant a new trial on punitive damages. Indeed because of the jury's probable consideration of these dissimilar matters in assessing punitive damages, the conclusion that a new trial is necessary is constitutionally compelled. *See* Sand Hill Energy, Inc. v. Smith, 142 S.W.3d 153 (Ky. 2004) (new trial required where evidence of out-of-state conduct admitted in contravention of State Farm and no instruction was given not to base punishment on that conduct.). *See also* Wohlwend v. Edwards, 796 N.E.2d 781, 786-87 (Ind. Ct. App. 2003) (error to admit evidence that does not satisfy State Farm's causation requirement).

(Appellant's Final Brief on Behalf of Appellant/ Respondent, p. 42). The courts in *Sand Hill* and *Wohlwend* both remanded cases for new trials limited to punitive damages. In its argument to the Supreme Court of South Carolina, the Petitioner distinguished between its request for a new trial on punitive damages and a new trial absolute when it argued that "not only is [Petitioner] entitled to a new trial on punitive damages ... it is also entitled to a new trial on liability because unreliable

expert opinions pervaded plaintiff's case." (Appellant's Final Brief on Behalf of Appellant/Respondent, p. 42).

A party cannot complain when it receives the relief it has requested from the court. *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228 (1952); *Bowman v. Bowman*, 357 S.C. 146, 591 S.E.2d 654 (S.C. App. 2004). The Petitioner asked the Supreme Court of South Carolina for a new trial on the issue of punitive damages and cited authority for its requested relief. Now that the Petitioner has been granted the relief it requested, it claims the relief it sought is unconstitutional. The Petitioner cannot now complain that a new trial on punitive damages is unconstitutional and the Petition should be denied. Further, the Petitioner should not be allowed to use this forum to collaterally attack the jury's actual damages award by now claiming a retrial of only punitive damages is unconstitutional.

II. THE PETITIONER HAS NOT BEEN INJURED AND DOES NOT HAVE ARTICLE III STANDING TO INVOKE THE COURT'S JURISDICTION.

The Petitioner argues "the Supreme Court of South Carolina has ruled in a manner that violates" the holdings of *Campbell* and *Philip Morris USA v. Williams*, 549 U.S. ___ (2007). The Supreme Court of South Carolina did not affirm the jury's award of punitive damages against Petitioner and its due process rights have not been violated. Rather, the jury's punitive damages award was reversed and remanded due to the trial judge's erroneous jury charge regarding the burden of proof to be applied by the jury when deciding whether to award punitive damages. The Petitioner has not

suffered any injury due to the Supreme Court of South Carolina's decision because there has not been an award of punitive damages against the Petitioner.

The Court may exercise jurisdiction over a case where the judgment of a state court causes "direct, specific, and concrete injury to the parties who petition for [the Court's] review, where the requisites of a case or controversy are also met." *Nike v. Kasky*, 539 U.S. 654 (2003) (citing *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989)). However, a party does not have Article III standing to invoke the jurisdiction of the Court where "no 'final judgment altering tangible legal rights' has been entered." *Id.* Further, the Court will not extend its jurisdiction "to cover an interlocutory ruling that merely allows a trial to proceed." *Id.*

While the Petitioner alleges it "is at grave risk that it will have its due process rights violated," the Supreme Court of South Carolina's decision is not a "final judgment altering tangible legal rights." Rather, the decision is an interlocutory ruling that allows a retrial of punitive damages. The Petitioner does not have Article III standing to invoke the jurisdiction of the Court and the Petition should be denied.

III. THERE HAS NOT BEEN A FINAL DECISION ON PUNITIVE DAMAGES AS REQUIRED FOR REVIEW BY THE COURT.

The Petitioner requests the Court to review an unpublished, interlocutory decision of the Supreme Court of South Carolina. 28 U.S.C.A. § 1257(a) provides "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be

reviewed by the Supreme Court by writ of certiorari ..." The state court's decision was not a final judgment as stated in 28 U.S.C.A. § 1257(a). Rather, the state court remanded the issue of punitive damages for retrial. While the Petitioner alleges any award of punitive damages will deprive it of due process, there has yet to be a determination as to whether any punitive damages will be awarded against Petitioner. Because the Petitioner has not suffered any harm and there has not been a final judgment on punitive damages, its Petition should be denied.

This case does not fall within any exceptions to the finality requirement for granting a writ of certiorari as set out in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Each of these exceptions apply to cases where a federal issue has been "finally decided" but there are further proceedings yet to occur. The Supreme Court of South Carolina has not "finally decided" any federal issue. A ruling on the federal issues raised by Petitioner was unnecessary because the Supreme Court of South Carolina found the trial judge erred in her charge on clear and convincing evidence. As these federal issues were unnecessary to the court's decision and were not addressed, the Petitioner is free to raise these issues to the trial court and, if it does not prevail on retrial, to the state appellate courts. Since there has been no decision on these federal issues, the outcome of Petitioner's challenge is not "preordained." If the Petitioner prevails, the federal issue will not "survive and require decision." Finally, a reversal of the state court on the federal issue would not be "preclusive of any further litigation" on the issue of punitive damages. The parties will still have to litigate punitive damages. Therefore, the Petition does not fall within any of the exceptions to the finality

requirement for the issuance of a writ of certiorari and the Petition should be denied.

Further, "[t]he Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Nike v. Kasky, supra.* There will not be a question of constitutional law for the Court to decide if punitive damages are not awarded on retrial. At the trial on punitive damages the Petitioner will be able to request all the jury charges and make all objections to evidence it made in the first trial. Therefore, there is not a necessity to decide any issue of constitutional law and the Court should not exercise jurisdiction over this case.

IV. THE PETITIONER HAS NOT PRESENTED QUESTIONS OF SUFFICIENT GENERAL IMPORTANCE FOR REVIEW BY THE COURT.

The Court has long held:

> It is very important that we be consistent in not granting the writ of certiorari except in cases involving the principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923). "Even though the resolution of a constitutional question would be of great practical importance to the litigants, that is ordinarily not a sufficient reason for granting certiorari, where the question is not of sufficient

general importance." 36 C.J.S. Federal Courts § 296; *See also, Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994).

Granting the Writ of Certiorari would not resolve any question of importance to anyone other than the parties to this litigation. The state court's opinion specifically states "THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2) SCACR."[1] As such, the Supreme Court of South Carolina's decision has no precedential value and will not control the outcome of any other cases. Therefore, the resolution of the constitutional question would only be of importance to the parties to this case, if it is in fact even important to them, and is not of sufficient general importance to warrant a decision of the Court.

V. THE WRIT FOR CERTIORARI IS NOT CONSISTENT WITH SUPREME COURT RULE 10.

Contrary to the Petitioner's contention, the Supreme Court of South Carolina did not "decide an important question of federal law that has not been, but should be, settled by this Court" or decide "an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The Supreme Court of South Carolina reversed the award of punitive damages because "the trial court's jury instructions in this case misstated the standard of proof for clear and

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[1] "Unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." SCACR 239(d)(2).

convincing evidence" as required under South Carolina Code Ann. § 15-33-135 (2005). The Supreme Court of South Carolina did not decide the federal questions presented in the Petition for Writ of Certiorari because Petitioner raised those issues for the first time in its Petition for Rehearing to that court. The Supreme Court of South Carolina denied the petition without a decision on any of the issues presently being raised. Therefore, granting a writ is not warranted under Supreme Court Rule 10(c).

The Court may grant a writ of certiorari where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals". Sup. Ct. R. 10(b). There is not a split of authority on any important federal question decided by the Supreme Court of South Carolina in this case. In fact, the United States courts of appeals have frequently remanded actions to trial courts for retrials limited to the issue of punitive damages.[2] Since there is not a conflict in decisions on a federal question that needs to be decided by the Court, this case does not fall under Supreme Court Rule 10(b).

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[2] *See, Che v. Massachusetts Bay Transp. Authority*, 342 F.3d 31 (1st Cir. 2003); *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163 (2nd Cir. 2000); *Alexander v. Riga*, 208 F.3d 419 (3rd 2000); *Defender Industries, Inc. v. Northwestern Mut. Life Ins. Co.*, 938 F.2d 502 (4th Cir. 1991); *Black v. Fidelity & Guaranty Ins. Underwriters, Inc.*, 582 F.2d 984 (5th 1978); *Whits v. Burlington Northern & Santa Fe R. Co.*, 364 F.3d 789 (6th Cir. 2004); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503 (7th Cir. 1997); *Brooks v. Woodline Motor Freight, Inc.*, 852 F.2d 1061 (8th Cir. 1988); *White v. Ford Motor Co.*, 312 F.3d 998 (9th Cir. 2002); *E.E.O.C. v. Heartway Corp.*, 466 F.3d 1156 (10th Cir. 2006); and *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir. 1987).

"A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Much of the Petitioner's argument stems from its inaccurate statement that Petitioner's dissimilar acts, separate from the acts on which liability was premised, served as the basis for the jury's award of punitive damages. In following *Campbell,* supra., the trial court properly considered the evidence to determine if the evidence was of conduct "substantially similar" to the conduct of the Petitioner which gave rise to the subject lawsuit. (Tr. P. 2027, lines 20-24). The trial judge made fact specific findings that the evidence Respondent introduced was not dissimilar or unrelated to the conduct which resulted in harm to Mr. Williams. The trial judge also specifically charged the jury that the evidence was introduced for the limited purpose of establishing notice and should be viewed only in that regard. (Tr. 1487, line 25- p. 1488, line 8; r. p. 1494, lines 10-24; Tr. p. 2084, line 14- p. 2085, line 8; Tr. p. 2036, lines 7-17; Tr. p. 3530, lines 1-21). Any error asserted by the Petitioner on this issue could only be an erroneous factual finding or the misapplication of *Campbell,* a properly stated rule of law. Therefore, the Petition for Writ of Certiorari is not consistent with Supreme Court Rule 10 and should be denied.

VI. THE TRIAL COURT DID NOT ADMIT EVIDENCE IN VIOLATION OF *CAMPBELL* OR *PHILIP MORRIS.*

The Petitioner incorrectly argues that the trial court improperly admitted evidence of dissimilar, unrelated conduct that served as a basis for the jury's award of punitive damages in violation of *Campbell,*

supra. "A defendant's dissimilar acts, independent from acts on which liability was premised, may not serve as a basis for punitive damages." *Id.* at 422. "The Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties..." *Philip Morris, supra.*

The trial court did not admit evidence of dissimilar, unrelated conduct. Petitioner owns, maintains and operates a continuous railroad track through twenty three states, including South Carolina. At trial, the Respondent presented a portion of the Federal Railroad Administration's Safety Assurance and Compliance Program Report from a safety assurance and compliance audit performed by the FRA in February of 1998. The report discusses Petitioner's ongoing problem with excessive vegetation on its rights-of-way. (Tr. P. 2031, line 17- p. 2032, line 10). The FRA audit discusses Petitioner's vegetation control problems across Petitioner's "system on several operating divisions" and concludes that Petitioner did not have a sufficient vegetation control program in place to properly address its problems with excessive vegetation. (Tr. P. 2032, Line 23-2 p.2033, line 2). The Respondent also presented evidence that Petitioner received this report and acknowledged that it lacked a proper vegetation control program. The Petitioner's failure to properly maintain vegetation on its right-of-way resulted in Mr. Williams' death.

The trial court admitted a report of DeAngelo Brothers, a contracting company, which identified several problems Petitioner was experiencing with vegetation control at its railroad grade crossings and the sight obstructions to motorists caused by the vegetation. The

trial court likewise admitted a letter from Union Pacific Railroad to Petitioner wherein Union Pacific discussed the problems it incurred with controlling vegetation at railroad crossings and how the vegetation obstructed motorists' sight distance and caused collisions. Union Pacific described the vegetation control program it had implemented and the effectiveness of the program. Even though it had notice of the need for a program to effectively control vegetation on its crossings which obstructed the sight distance of motorists, the Petitioner failed to take measures to effectively control the vegetation at its crossings. Evidence was also admitted of fines imposed by the South Carolina Department of Transportation for Petitioner's failure to control excessive vegetation which created sight distance obstructions at its railroad crossings throughout South Carolina. The trial court also allowed testimony regarding two collisions at two of Petitioner's other railroad crossings in South Carolina which occurred prior to the subject collision. The trial court found that both of these collisions were substantially similar because of the existence of sight distance obstructions due to excessive vegetation on Petitioner's right-of-way.

None of this evidence involves dissimilar, unrelated acts. The evidence all stems from one issue, failure to maintain sight obstructing vegetation. The Respondent alleged, and proved, Mr. Williams was not able to see the ballast regulator which struck his vehicle because of the excessive vegetation at the subject crossing. Petitioner's failure to control its vegetation, among other acts of negligence, caused Petitioner's death. Because all of the contested evidence related directly to sight distance obstructing vegetation and Petitioner's failure to control vegetation, it is not dissimilar.

The admission of this evidence is consistent with *Campbell*. "Evidence of other acts need not be identical to have relevance in the calculation of punitive damages..." *Campbell* at 423. In *Campbell*, the Court held "because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.* at 424. Unlike *Campbell*, here the Respondent introduced evidence that the Petitioner's system wide practice of ignoring appropriate vegetation control caused Mr. Williams' death. The Respondent showed evidence of similar crossings in South Carolina with obstructed sight distance and two similar collisions in South Carolina which were caused by obstructed sight distance. The evidence of Petitioner's conduct on those occasions is extremely similar, if not identical, to the conduct that harmed Mr. Williams. Therefore, the evidence is relevant to the reprehensibility analysis.

Further, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Campbell* at 422. The FRA report and the DeAngelo Brothers proposal both cite Petitioner's ongoing problems with excessive vegetation and Petitioner's need to adopt a vegetation control plan. While these documents include problems with vegetation in other states, they both include Petitioner's rights-of-way in South Carolina and the crossing in question. This evidence shows that vegetation control was considered by Petitioner as a system wide program. This system wide problem included South Carolina.

In admitting the FRA report, the trial court properly applied *Campbell*. The trial judge found that the FRA report contained evidence of vegetation control in other states, but that it included South Carolina. The trial court found it was relevant to the issue of Petitioner's notice of its need for a vegetation control program, and admitted the report for this limited purpose. Petitioner's failure to implement a proper vegetation program has a nexus to the harm caused to Mr. Williams as Mr. Williams was killed because his sight distance was obstructed due to excessive vegetation. The Petitioner's failure to implement a vegetation control program, when it had knowledge of excessive vegetation on its rights-of-way and at the crossing in question, demonstrates the deliberateness and culpability of Petitioner's conduct and was properly admitted.

VII. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION AND THE UNDERLYING TRIAL PROVIDED ADEQUATE PROCEDURAL SAFEGUARDS WHICH ARE CONSISTENT WITH *PHILIP MORRIS*.

The Petitioner argues that the trial court admitted "dissimilar evidence relating only to third parties, without any procedural safeguards," thereby creating "a 'perfect storm' of due process violations under *Philip Morris*." (Petitioner's Brief, p. 12). Petitioner frames its question as an issue of whether South Carolina failed to "guard against jury confusion concerning the due process limitations on punitive damages" under *Philip Morris*. As stated above, the trial court specifically found that the evidence of which the Petitioner complains was *not* "dissimilar" or unrelated to the harm in this case.

Therefore, the threat of jury confusion addressed in *Philip Morris* was not present in this case.

The trial court admitted the DeAngelo Brothers proposal in evidence with the following limiting instruction:

> [I]t is admitted solely for the purpose of showing that [Petitioner] had notice, had notice of the alleged need to have a vegetation control plan and for no other purpose. This evidence is to be considered by you on that issue. However, on that issue only. And it is not proof of any matter, other than that of notice.

(Tr. 1487, 1488). The other evidence Petitioner claims was dissimilar was admitted subject to the same limiting jury instruction. (Tr. P. 1494, lines 10-24; Tr. P. 2084, line 14-p. 2085, line 8; 2036, lines 7-17). The trial judge properly instructed the jury that the above described evidence was admitted solely to prove the Petitioner had notice of the "alleged need" of a vegetation control plan and that the evidence was not to be considered for any other purpose. Juries are presumed and bound to follow the law as instructed to them by the trial judge. *State v. Grovenstein*, 517 S.E.2d 216 (S.C. 1999).

"Although the states have some flexibility to determine the *kind* of procedure they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Philip Morris* at 1065. The contested evidence was admissible on the issue of notice and the Petitioner's due process rights were protected by the trial judge's limiting instructions. The

evidentiary findings of the trial court and its limiting instructions, coupled with the Supreme Court of South Carolina's conscientious findings on appeal, illustrate the presence of adequate procedural safeguards which comport with the Court's decision in *Philip Morris*.

Furthermore, while the Petitioner complained of issues concerning the admissibility of evidence to the Supreme Court of South Carolina, the evidentiary issues were not raised as issues on appeal as required by the South Carolina Appellate Court Rules. SCACR, 208. Because the Petitioner failed to include the trial court's rulings on the contested evidence as an issue on appeal, there is no ruling by the Supreme Court of South Carolina on the substance of any evidentiary issue which Petitioner now complains will deprive it of due process on retrial. The Petitioner relies on the blanket conclusion that "dissimilar" evidence was admitted and will be presented at retrial, despite the fact that these conclusions were never properly raised and ruled upon in the Supreme Court of South Carolina. Essentially, the Petitioner seeks to create a constitutional issue on issues which were never properly raised or addressed by the Supreme Court of South Carolina.

Notwithstanding the above, even if the requisite procedural safeguards were not provided below, on retrial the trial court is bound to apply the analysis of *Philip Morris* as well as all of the Court's holdings in its long line of punitive damages cases. The Petitioner's request for the Court to review this case is premature because under the decision of the Supreme Court of South Carolina, the new trial must meet all constitutional requirements.

VIII. THE SUPREME COURT OF SOUTH CAROLINA'S DECISION TO ORDER A RETRIAL LIMITED TO THE ISSUE OF PUNITIVE DAMAGES IS CONSISTENT WITH THE CONSTITUTIONAL REQUIREMENTS OF *CAMPBELL* AND *PHILIP MORRIS*.

The Petitioner argues that the trial court's use of a general verdict form and the Supreme Court of South Carolina's affirmation of the jury's award of actual damages precludes the Petitioner from determining which conduct it will have to defend against at the retrial on punitive damages and therefore Petitioner will be deprived of its rights of due process. This argument is without merit.

Contrary to the Petitioner's assertions, the Petitioner's due process rights under *Campbell* and *Philip Morris* were protected during the state court trial and on appeal. As addressed above, the trial court made specific findings that the contested evidence was admissible considering *Campbell*'s "dissimilar conduct" analysis. These rulings were properly upheld by the Supreme Court of South Carolina. Proper evidentiary and procedural safeguards were employed, and the trial court properly instructed the jury this evidence was only to be considered on the issue of notice. Notice may properly be considered in the reprehensibility analysis for punitive damages. *Gore*, supra. Finally, at the post-trial stage, the trial court applied the Court's precedent and conducted a *de novo* review of the punitive damages award, and reduced the award of punitive damages to a one-to-one ratio which is well within the parameters of the Court's constitutional limitations on punitive damage awards.

Even though the constitutional safeguards of *Campbell* and *Philip Morris* have been applied in the state court, Petitioner now attempts to create a constitutional issue of the trial court's use of a general verdict form. During the trial Petitioner proposed a special verdict form which required the jury to answer, including subparts, thirty-one (31) specific questions. (Petitioner's App., 31a-36a). The trial court, in its discretion, declined to submit this special verdict form to the jury. Petitioner claims that because of the use of a general verdict form in the first trial, the jury in the second trial may punish the Petitioner on a theory of liability different from the theory of liability on which the jury awarded actual damages. The Petitioner misstates the constitutional safeguards which are required. The constitutional requirement is that the jury may only punish the Petitioner for the conduct which it determines killed Mr. Williams. On retrial, the jury will be so instructed, and the Petitioner's constitutional due process rights will be protected.

The retrial of punitive damages will include the presentation of all theories of liability previously presented, and the same evidence which Petitioner objected to in the first trial will be offered and the trial court will have to rule on the admissibility of the evidence. The trial court is bound to ensure that all procedural safeguards required by the Court are employed. The *Campbell* analysis will be applied by the trial court to all evidence which is offered in evidence, and the safeguards required by *Philip Morris* to guard against jury confusion will be instituted. Petitioner will have the opportunity to again challenge the admissibility of evidence it now contends is inadmissible. At the close of the case, the jury will be charged on the applicable law

and will decide whether the conduct of Petitioner warrants an award of punitive damages. Even if there were deficiencies in the previous trial with regard to punitive damages or in the appellate court, these deficiencies are of no consequence because the Petitioner will receive a new trial on punitive damages.

The Petitioner seeks to have the Court dramatically expand the concept of substantive due process to require state courts to use a special verdict form in all cases seeking punitive damages which involve more than one theory of liability. The verdict form used by state trial courts would become a federally mandated due process issue.[3] While the Court has explicitly set forth procedural and substantive requirements in the field of punitive damages, it has never sought to impose specific trial procedures, but it has left these types of decisions to the state courts. *Philip Morris* at 1065. Accordingly, the Petition for Certiorari should be denied.

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[3] The decision of whether to submit a general or special verdict form to the jury has long been held as a discretionary power of the trial judge in South Carolina. *See, Love v. Oswald*, 272 S.C. 347, 251 S.E.2d 766 (1979) (Establishing that this is an issue of discretion).

IX. THE SUPREME COURT OF SOUTH CAROLINA DID NOT APPLY THE TWO ISSUE RULE IN AFFIRMING THE TRIAL COURT; AND, EVEN IF THE TWO ISSUE RULE WERE APPLIED, THE APPLICATION OF THE RULE DOES NOT PREVENT A *DE NOVO* REVIEW OF A PUNITIVE DAMAGES AWARD ON APPEAL.

Petitioner petitioned the Supreme Court of South Carolina for rehearing contending that it "incorrectly applied the two issue rule in a fashion never before recognized... and in a manner that creates a disincentive for trial courts to ever grant a party's request for a special verdict form." Petitioner further argued vaguely and without supporting authorities, that the application of the two issue rule "unconstitutionally prevents the *de novo* review of punitive damages awards."

The Supreme Court of South Carolina did not apply the "two issue" rule in affirming the award of actual damages. Petitioner bases its argument on the Supreme Court of South Carolina's recognition that there were "several other, more thoroughly developed theories of liability" and that an erroneous jury charge did not warrant reversal of the actual damages award. This sentence in the Supreme Court of South Carolina's opinion did not reflect application of the "two issue" rule. The Supreme Court of South Carolina found the erroneous instruction did not harm petitioner and it was not prejudiced by the erroneous charge on negligence *per se*. Under South Carolina law, the issue of whether an erroneous jury instruction rises to the level of reversible error is determined by whether the appellant has shown sufficient prejudice. "[T]he giving of an erroneous

instruction is not reversible error, unless the appellant can show that he was injured or prejudiced thereby." *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961). The Supreme Court of South Carolina, in noting the other theories of liability which were more fully developed against Petitioner, merely illustrated the lack of prejudice occasioned by the erroneous charge given to the jury.[4]

Even if the Supreme Court of South Carolina used the "two issue" rule in order to uphold the lower court, such application does not rise to a constitutional due process issue that should be decided by the Court. "Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported by at least one issue, the verdict will not be reversed on appeal." *Todd v. South Carolina Farm Bureau Mutual Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 473-74 (1985); *Anderson v. South Carolina Department of Highways and Public Transportation*, 322 S.C. 417, 472 S.E.2d 253 (1996). The "two issue" rule is utilized by the appellate courts of South Carolina as "a procedural tool for upholding" decisions and upon application of the rule, South Carolina courts will "find it unnecessary to address all the grounds appealed where one requires affirmance." *Id.* at 255.

The Petitioner argues without explanation, that a "*de novo* review [of punitive damages] cannot be properly conducted when the two issue rule, combined with a

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[4] The lack of prejudice or injury caused by the erroneous jury instruction is further illustrated by the fact that even without the negligence *per se* charge based upon 49 C.F.R. § 214.355, South Carolina common law principles impose upon Petitioner the duty to properly supervise and train its employees.

refusal to grant a request for a special verdict form, prevents the appellate court from ascertaining the underlying basis for punitive damages." This bald assertion is completely unsupported by citation to authority and is so conclusory that the Court should not consider this contention.[5] Moreover, even if the argument is properly before the Court and has not been waived or abandoned, it strains logic to conclude that a retrial on punitive damages would not include proper procedural safeguards. As discussed above, all evidentiary issues will be reheard and the jury will be instructed by the trial judge consistent with the Court's decisions regarding punitive damages. If punitive damages are awarded, the trial court and appellate courts will then review the amount of the award in accordance with *Campbell, supra,* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Further, the Supreme Court of South Carolina's decision to affirm the award of actual damages is the only final decision of the South Carolina Supreme Court. As stated above, the Supreme Court of South Carolina found the erroneous charge on negligence *per se* did not prejudice the Petitioner because of the other well developed theories of negligence submitted to the jury. These other theories of negligence, as well as the finding that Petitioner was not prejudiced by the erroneous charge, all involved state law and provided separate, adequate and independent state grounds for the Supreme Court of South Carolina's decision.

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5 *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *Cole v. South Carolina Electric & Gas, Inc.*, 355 S.C. 183, 584 S.E.2d 405 (2003); *Glasscock, Inc. v. United State Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) (stating short, conclusory arguments unsupported by authority are deemed abandoned).

The Supreme Court of South Carolina did not make any determination of issues of federal law requiring review by the Court under 28 U.S.C.A. § 1257(a). Therefore, as the only final judgment of the Supreme Court of South Carolina is based on adequate and independent state grounds, the Petitioner's Writ of Certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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